

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PIZZA WORKS, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Tax under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1981	:	
through February 29, 1984.	:	

Petitioner, Pizza Works, Inc., 1376 Lexington Avenue, New York, New York 10028, filed a petition for the revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through February 29, 1984 (DTA No. 802463).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Taxation, Two World Trade Center, New York, New York on June 24, 1988 at 9:00 A.M. The petitioner was represented by its officer, Aristides Matsis. The Division of Taxation was represented by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

- I. Whether petitioner correctly reported sales tax on sales of its pizzeria.
- II. Whether a penalty asserted under Tax Law § 1145(a)(1)(i) for a failure to file returns or pay over sales taxes was correct or whether petitioner has shown that any such failure was due to reasonable cause and not to willful neglect.

FINDINGS OF FACT

1. Petitioner operates a pizzeria in the upper East side of Manhattan. It sells pizza, soda, ice cream and ices. It also has vending machines.
2. Petitioner did not maintain a cash receipt book nor did it have a cash register. Sales tax returns were made from bank statements. Petitioner had records of purchases of flour, from its supplier, Ferro Foods. Petitioner had no records of purchases of soda, ice cream or ices.

3. (a) The computation of the tax determined to be due started with petitioner's records of flour purchased. The flour amounted to 52,600 pounds for the audit period. The auditor assumed that 1.56 pounds of flour was used in each pizza and calculated that 33,716 pies were made of 8 slices each. This amounted to 269,696 slices. He assumed the price of a slice was 70¢ in the first three quarters, 80¢ in the next four quarters, 90¢ in the next four quarters and \$1.10 in the last quarter. These assumed prices include sales tax. The total pizza sales thus computed came to \$217,188.00. This calculation includes no amount for waste.

(b) The weight of each pizza was determined by the auditor. He weighed seven pizzas, they each weighed either 2.5 or 2.75 pounds. They averaged 2.6 pounds.

(c) The amount of flour in each pizza was determined. Originally the auditor had estimated 1 pound of flour per pizza as he, and his office, had estimated in previous cases. However, petitioner produced a recipe for pizza which called for ten pounds of flour and 6 pounds 6 and a quarter ounces of other ingredients. This amounts to 61.5% of flour by weight. Also, a laboratory analysis of pizza dough taken on another audit had shown the weight of all solids (primarily flour) to be over 60% of the weight of the dough. Petitioner has argued persuasively that this laboratory analysis must have been performed after some delay which would have caused an increase in the liquid portion of the dough over what it should have been if it was used. Therefore, the solid portion of the pizza dough used was actually higher than the 60% arrived at by the laboratory test. Sixty percent of petitioner's pies of 2.6 pounds amounts to 1.566 pounds.

4. From an observation test the auditor computed that soda sales amounted to 31.93% of pizza sales and that other sales (ice cream and ices) amounted to 5.52% of pizza sales. The sales thus computed for the entire audit period were \$60,343.00 for soda and \$11,988.00 for other sales.

5. (a) The total of all sales came to \$298,513.00. As this included sales tax the sales tax was taken out and a taxable sales figure of \$275,880.00 was arrived at. Petitioner had reported sales of \$150,204.00. The additional sales were \$125,676.00 and the additional tax due was \$10,284.54.

(b) A recomputation of the tax determined to be due was done (after the hearing was underway) to provide a waste factor. The 52,600 pounds of flour purchased was reduced by 15%, or 7,845 pounds, for waste. The result was 44,755 pounds. The flour was assumed to be purchased over the audit period as follows: 9,882 pounds for the three quarters ending November 30, 1981, 9,366 pounds for the four quarters ending November 30, 1982, 11,220 pounds for the four quarters ending November 30, 1983, and 3,315 pounds for the one quarter ending February 28, 1984. The pies made, at 1.57 pounds of flour per pie, were calculated to be 9,882, 9,386, 7,146 and 2,111 for the four periods. The prices the pizza was sold at was found to be \$5.60, \$6.40, \$7.20 and \$8.00 for the four periods. The receipts were thus calculated to be \$55,339.00, \$59,946.00, \$51,451.00 and \$16,888.00 for the four periods, or \$168,420.00 in total. Sales of soda were estimated to be 31.93% of pizza sales, or \$53,777.00. Miscellaneous sales were estimated to be 5.52% of pizza sales, or \$9,297.00. Gross receipts thus came to \$231,494.00. After an 8% tax is taken out, taxable sales amount to \$214,346.00. The sales reported on the return were \$151,294.00, leaving net additional sales of \$63,052.00 which taxed at 8.25% is \$5,202.00.

(c) Petitioner conducted his own test of waste. This was done over a six-day period. He found that he sold 85 pies. Thus waste was 3½ pies for miscuts, 3 pies for employee meals, 7 pies for overbaked pies, 10 pies for stale dough, 8¼ pies for stale slices, 15 pies for failed dough and 6-¾ pies for leftovers at closing, for 53½ pies wasted. This showed that the number of pies which he actually sold was 61% of all pies made (his figure of 65% I find is miscalculated). The waste factor would thus be 39%.

6. (a) The auditor observed the business for one day, September 17, 1984. Petitioner sold 137 slices of pizza at \$1.05, 1 large pie at \$8.50, 3 medium pies at \$5.50, 2 small pies at \$3.50

and extra toppings totaling \$2.50. The total pizza sales came to \$177.50. Petitioner also sold 44 small sodas at \$.80, 11 medium sodas at \$.95 and 10 large sodas at \$1.00, these totaled \$56.65. Petitioner also sold 5 ice cream's at \$1.00 and 6 "ices" at \$.80 for a total of \$9.80.

(b) The results of the observation test of one day can be placed on an annual basis (as the auditor did) assuming the petitioner was open 6 days a week. There are 13 weeks in a calendar quarter and the audit covered 12 quarters. The net sales after taking out the sales tax included in the pies, came to \$210,135.40.

7. Two Consents were signed extending the period of limitations to December 20, 1984 and to June 20, 1985.

8. A Notice of Determination and Demand for Payment of Sales and Use Tax was issued on June 20, 1985. This is for \$10,285.28 plus penalty of \$2,498.89 and interest \$4,318.96 for a total amount due of \$17,103.13. The penalty is asserted under Tax Law § 1145(a)(1)(i).